

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB – REGISTRY**

**AT MUSOMA**

**CIVIL APPEAL NO 13 OF 2021**

*(Arising from Civil Case No. 07 of 2017 in the Resident Magistrate Court of Musoma at Musoma)*

**RORYA DISTRICT COUNCIL ..... APPELLANT**

***VERSUS***

**SAMSON ALIWA (As the Guardian of**

**Debora Samson) ..... 1<sup>ST</sup> RESPONDENT**

**NESTORY KANDO (As administrator of the estate of the late**

**Osewe Olando) ..... 2<sup>ND</sup> RESPONDENT**

**STEPHENE O. KAGOSE (As the Guardian of**

**Bilishan Kogose) ..... 3<sup>RD</sup> RESPONDENT**

**INSAYANSI A. WAMBOGO (As the Gurdian**

**of Rose Wambogo) ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

2<sup>nd</sup> and 28<sup>th</sup> March, 2022

**F. H. MAHIMBALI, J.:**

The appellant in this case, Rorya District Council was vicariously sued by the respondents for damages occasioned to the respondents

following the road accident that costed the lives of four deceased persons related to the respondents.

The background facts leading to this appeal can be put this way. That the appellant's driver one Lameck Gerald Sembuche (Co – defendant at the trial court), was an employee by the appellant as driver. On the material date of the accident i.e on 26<sup>th</sup> October, 2015, the said driver was driving a Motor Vehicle with Reg. No. STK 7142 Toyota Land Cruiser along Musoma – Tarime Road, where at Kasino area in Makongoro Village in Rorya District carelessly driving, he failed to stop his vehicle and consequently knocked four people to dead. It is undisputed that the said driver was in the course of his employment when he succumbed the said accident.

It is from this accident then, the respondents ultimately sued the appellant and his employee for the claim of general damages to be assessed by the court and the specific damages of 14,145,000/= being funeral costs of the deceased persons.

Upon hearing of the suit, the respondents (plaintiffs by then) were awarded general damages to the tune of TZS 10,000,000/= per each respondent. The appellant is aggrieved by the said decision, thus the

basis of this appeal which is preferred on three grounds of appeal namely:

- 1. That, the trial Court erred in law and fact in deciding the case in favour of the respondent without considering the evidence adduced by the appellant during trial.*
- 2. That, the trial Court erred in law and fact in holding that the second defendant was in the course of employment of the Appellant.*
- 3. That, the trial court erred in law and fact in holding that appellant is vicariously liable for the damages.*

During the hearing of the appeal, the appellant was represented by Mr. Paxton Marwa, learned state attorney whereas the respondents were being represented by Mr. Christopher Waikama, learned advocate.

Arguing the appeal, Mr. Paxton on the first ground of appeal submitted that as per testimony of DW2 clearly states that the said motor vehicle alleged to have caused the said accident STK 7142 was not the property of Rorya District Council but belonged to the Ministry of Education working in the Department of Education Quality Assurance. This department does not fall within the Council's department and it is an independent institute in the district. As the said car was hired by DED in his capacity as Returning Officer in the General Elections, the District

council was not responsible to know the quality of the said vehicle. Had this been well considered, the trial magistrate wouldn't have arrived at that erroneous decision. It is his submission that the trial magistrate erred in holding the appellant responsible for the acts he was not in control with.

With the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, he jointly submitted them that, it is undisputed that what was being done on that day, was National Electoral Commission's duty. Under article 74 of the URT'S constitution, the said organ (NEC) is born. Its duties amongst others include holding the General Elections involving Ward councillors, Members of Parliament and the President. The said General Election is guided by two relevant Laws: The National Election Act, Cap 343 and the Local Government Authorities Act, Cap 292 of R. E. 2019. As per section 7 (1) of the National Election Acts, read together with section 9 (1) of the Local Government Authorities Act, he submitted that the returning officer in every District council is District Executive Director (DED). So, by that time, DED acted for NEC and not Rorya District Council. So, by virtue of section 7 (4) of the National Election Act, he is mandated to appoint other officers to work for him at the lower level. He referred this Court to section 4 of Cap 343 read together with section 56

of the same Act. It is on this Capacity, the DED of Rorya appointed the 2<sup>nd</sup> - Defendant (at the lower court) to be driver on the issue of Election Affairs, Therefore, all this time where the said driver was working for National Electoral Commission, he was acting as NEC's staff and not District Council's Office. This then means that, during the occurrence of the said accident, the said driver was not acting for Rorya District Council but National Electoral Commission.

He, submitted further that, the Employer is only responsible for his subordinate's wrongs where the said matter arises in the course of his employment. As to the facts and evidence of the present case it was not proper for Rorya District Council to be responsible of the said 2<sup>nd</sup> defendant who was not in the course of his employment at District Council but NEC he submitted. On that basis, he humbly prayed that this appeal be allowed with costs. The decision of the trial court be quashed and set aside.

On his part, Mr. Christopher Waikama learned advocate reacted against the submission by the appellant's counsel. On the first ground of appeal, he submitted that there is ample evidence by the respondents that the car which caused accident belongs to Rorya District Council.

The manner Rorya District Council participated in handling the affairs of the said accident, one cannot understand what the counsel for the appellant is submitting that the said vehicle is not owned by the appellant. PW2 and PW3 testified clearly on that behalf. He considered the argument as nothing but empty shell

As regards to the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, he jointly submitted that it is undisputed that the 2<sup>nd</sup> Defendant was acting within the scope of his employment. At page 10 of the typed judgment, the 2<sup>nd</sup> defendant was held vicariously liable. It is his submission that the said driver was acting under the directives of the appellant (1<sup>st</sup> defendant) and in the course of his employment, therefore Rorya District Council was responsible. He concluded by saying that this appeal is subject to dismissal for want of proof as alleged.

In his rejoinder submission while reiterating his submission in chief, on the issue of burial coffins why the DED funded their purchase, he submitted that they were purchased by use of emergence fund of NEC and not Council's office. Therefore, he insisted that it was not proper to implicate the DED for issues of NEC. On the issue of the said vehicle, he insisted that it didn't belong to Rorya District Council but

Education office which was hired for NEC affairs and not DED for council's activities.

Having heard the submissions from both parties, the pertinent issue here is whether this appeal is meritorious as argued.

Considering the evidence in record, it is undisputed that the said four deceased persons died of the said motor accident caused by the appellant's employee at the capacity as driver. It is also undisputed that the said driver was an employee of Rorya District Council and that on the particular date he was instructed to drive the said vehicle with Reg. No. STK 7142. The controversial issue being posed here is whether the said car belongs to Rorya District Council. Secondary, whether the driver was by that time not an employee of NEC. Thirdly, whether if at the material time DED was working at the capacity as Returning Officer, then he is immune from prosecution on tortious acts committed by his employees.

The law has always been this, he who alleges must prove (section 110 to 112 of the Tanzania Evidence Act, Cap 6, R.E 2019). This being a civil suit, the standard of proof is on balance/ preponderance of probabilities (Section 3(2) (b) of the Tanzania Evidence Act, Cap 6).

The evidence on record has proved the following facts, that the said driver was employed by the appellant at the capacity as driver. He was driving on the date of the accident motor vehicle with Reg No. STK 7142. That in the course of his employment, he caused the said accident. All these facts are undisputed. As to that, they are deemed being admitted and therefore proved.

The argument that the said vehicle belongs to the Ministry of Education and that the DED just hired it for General Election affairs at that time is unestablished. There ought to have been clear evidence on hire of the said vehicle and that the said employee was seconded to perform such duties. In the absence of clear evidence on that, as the government works on papers, then there is want of evidence on that.

Conversely, should we believe that at that time the said car was performing NEC's duties and so is the driver, that alone does not plainly exonerate liability to the respondent. Should this be true, the civil law is not silent on that. Order I, Rule 14 of the Civil Procedure Code, Cap 33 is clear on what to do. It is provided as hereunder:

*"Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party")-*



*a) any contribution or indemnity; or*

*b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff, the defendant may apply to the court for leave to present to the court a third-party notice.”*

If that assertion by the appellant’s counsel is true, then he was duty bound to implead the Executive Director of the National Electoral Commission as party to that case by third party notice. Failure to make him joined as he did, it is taken as true that the said vehicle belonged to the Rorya District Council, and the said driver was by that time performing Rorya District Council’s duty as dully employed for. On this, I get inspiration in the case of **Yafesi Walusimbi V A.G** (1959) E.A where the Court provided guidelines how the defendant who claims indemnity by another person who is not party to that suit, may apply to Court for him to be joined as party to that case though not sued by the plaintiff. In this way, the appellant would have been relieved his obligation as charged. However, in the circumstances of this case where such a procedure was not opted by the appellant, he cannot deny and escape liability.

That said and done, this appeal is of no merit and the same is dismissed with costs. The trial court's findings and orders are confirmed and upheld as being rightly reached.

DATED at MUSOMA this 28<sup>th</sup> day of March, 2022.



  
F.H. Mahimbali

Judge

**Court:** Judgment delivered this 28<sup>th</sup> day of March, 2022 in the presence of the Respondent, Mr. Paxton Marwa, learned state attorney for the appellant and Mr. Gidion Mugo, RMA.

Right of appeal is explained.

  
F.H. Mahimbali

Judge

28/03/2022